

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CASCADE MANUFACTURING SALES, INC.,  
a Washington corporation,

Plaintiff,

vs.

PROVIDNET CO TRUST, a Washington  
trust dba WORMSWRANGLER.COM;  
BARRY RUSSELL, an individual,

Defendants.

CASE NO: C08-5433RBL

CASCADE MANUFACTURING SALES,  
INC.'S TRIAL BRIEF

Trial Date: January 25, 2010

Pursuant to the Court's Scheduling Order issued on October 20, 2008 (Dkt. # 31)

Cascade Manufacturing Sales, Inc. ("**Cascade**") hereby submits this trial brief.

**I. INTRODUCTION**

Cascade Manufacturing Sales, Inc. ("**Cascade**"), the owner of the federally registered WORM FACTORY trademark (the "**Mark**") asserts trademark infringement and unfair competition claims against Providnet Co Trust, d/b/a WormsWrangler.com ("**Providnet**") and Barry Russell ("**Russell**") (together "**Defendants**"). It is undisputed that Defendants used the Mark without permission from Cascade along with identical or nearly identical goods. Defendants have presented no colorable evidence of any authorization from Cascade to use the

1 Mark. While Defendants hazily claim that some sort of joint venture agreement existed between  
 2 the parties which purportedly created rights in the Mark in favor of Defendants, Defendants  
 3 could not describe the terms of this agreement. Moreover, during the course of discovery, they  
 4 produced no emails, correspondence, or other documents constituting evidence of this  
 5 agreement.

6 In addition to using the identical Mark, it is undisputed that Defendants also made minor  
 7 changes to the Mark and used this confusingly similar version to identify goods identical or  
 8 nearly identical to Plaintiff's goods. The variation of the Mark utilized by Defendants is likely to  
 9 cause confusion, as the United States Patent and Trademark Office has already determined.

10 Defendants have also repeatedly marketed their products along with a "patent pending"  
 11 language, even though they have produced no evidence of any pending patent applications or any  
 12 registered patents. Defendants also claim that their products are "made in the USA," when in  
 13 fact at least a substantial portion of the products are not made in the United States.

## 14 II. SUMMARY OF FACTS

15 Cascade intends to prove the following facts at trial.

### 16 A. CASCADE'S BUSINESS AND RIGHTS IN THE MARK

17 Since 1999, Plaintiff Cascade has engaged in the business of manufacturing and selling  
 18 composting bins. Throughout its years of operation, Cascade has extensively promoted its  
 19 products and has used the federally registered trademark, "WORM FACTORY" (the "Mark")  
 20 (Registration number 3448973) to promote its compost bins. The Mark has been used in  
 21 commerce by Cascade since at least 2004, and Cascade's use of the Mark has been substantially  
 22 continuous and exclusive. Cascade is one of the preeminent manufacturers of composting bins  
 23 and is well recognized in the industry. Cascade's recognition stems from the fact that it has  
 24 spent a considerable amount of time, money, and effort to build strong brand recognition and  
 25 associated goodwill; its registered trademark is a major repository of this goodwill, and  
 26 undermining the trademark undermines the value of the effort spend in building Cascade's

1 brands and improving its sourcing and other processes. Cascade engages in the promotion and  
2 sales of its products through various channels of commerce, including the internet and traditional  
3 retail stores.

4 **B. DEFENDANTS' VARIOUS BUSINESS ENTITIES**

5 Providnet is one of many "trusts" operated by Barry Russell. These "trusts" are  
6 essentially just an extension of Barry Russell's sole proprietorship, as they are not recognized by  
7 the IRS, and, in fact, Russell does not feel that he is required to pay federal income tax, either  
8 personally or with respect to any of the trusts – or "unincorporated business organizations," – as  
9 Mr. Russell often calls them.

10 Mr. Russell testified that he is the sole trustee for Providnet and Sandalwood and freely  
11 transfers funds and authorizes use of purported trademarks by both entities without any written  
12 documentation or corporate authorization whatsoever. Russell (through Providnet) operates the  
13 wormswrangler.com website (the "*Site*"). Russell and his various entities market and sell their  
14 composting bins through many channels, including direct sales and distribution through internet  
15 websites, such as Amazon and eBay.com, and through various commercial resellers or dealers.  
16 The composting bins sold by Defendants are similar in style and in the same cost-range as  
17 Cascade.

18 **C. THE CONTRACTUAL RELATIONSHIP AND ITS TERMINATION**

19 Initially, Cascade and Defendants were parties to a re-seller agreement (the  
20 "*Agreement*") pursuant to which Defendants would sell products on behalf of Cascade, and  
21 Cascade would fulfill any orders procured by Defendants. The Agreement expired by its own  
22 terms in January, 2008.

23 Defendants defaulted on the Agreement in 2006 and ceased paying Cascade the amounts  
24 which Cascade was due. As a result, Cascade terminated the Agreement in late 2006. The  
25 Agreement does not contain any provisions for an ongoing trademark license between Cascade  
26 and Provident. Outside of the Agreement, Cascade has not authorized Defendants to use the

1 Mark or any variations of the Mark, and Defendants have introduced no colorable evidence  
2 contradicting this.

3 **D. DEFENDANTS' ACTS OF INFRINGEMENT**

4 Following severance of the relationship between Cascade and Defendants, Defendants  
5 continued to use the Mark and variations of the Mark to sell Defendants' own composting bins.  
6 Defendants used the Mark itself on their own Site, on marketing materials, and through third  
7 party distributors. The Court entered an injunction on November 12, 2008 to prohibit further use  
8 of this Mark. Following entry of the Injunction, Defendants superficially altered the Mark (from  
9 "WORM FACTORY" to "FACTORY OF WORMS"); in fact, Defendants applied to the United  
10 States Patent and Trademark Office for rights in the confusingly similar variation of the Mark  
11 "GUSANITO FACTORY OF WORMS". The trademark office issued an office action rejecting  
12 the application on the basis that the GUSANITO FACTORY OF WORMS mark conflicted with  
13 Plaintiff's registered Mark (WORM FACTORY) on the basis of likelihood of customer  
14 confusion, and Plaintiff had priority. Defendants did not oppose this office action within the  
15 time allotted by the USPTO and thus Defendants mark was abandoned.

16 Defendants' acts of infringements have caused confusion among Cascade's customers or  
17 potential customers. One long-time Cascade customer who also sells composting bins attests  
18 that she received numerous queries from customers regarding the differences between the two  
19 brands of "worm factory" composting bins. Customers have asked about the difference between  
20 the composting bins sold by Providnet through the Site and those sold by Cascade. People have  
21 expressed confusion to Cascade's customers and associates as to the source of these two  
22 products. Additionally, people have expressed actual confusion in postings on the internet (in  
23 message boards).

24 In addition to trademark infringement, Defendants have engaged in unfair competition  
25 based on two acts: (1) Defendants have consistently marketed their products using a "patent  
26 pending" designation, even though no valid patent or patent application covers Defendants'

1 products and (2) Defendants have advertised their products as being “made in the USA,” when  
 2 this is untrue.

### 3 III. RELEVANT LEGAL STANDARDS

#### 4 A. LANHAM ACT (TRADEMARK) CLAIMS

##### 5 1. General Lanham Act standards.

6 Section 43(a) of the Lanham Act prohibits the use in commerce of “any word, term,  
 7 name, symbol or device” which “is likely to cause confusion, or to cause mistake, or to deceive  
 8 as to the affiliation, connection or association of such person with another person, or as to the  
 9 origin, sponsorship, or approval of his or her goods . . . by another person.” 15 U.S.C. §  
 10 1125(a)(1). To establish trademark infringement in the Ninth Circuit, Cascade must demonstrate  
 11 validity, priority and confusion. Specifically, Cascade must only establish that (1) its mark  
 12 WORM FACTORY is valid; (2) that Cascade is the senior user of the WORM FACTORY mark,  
 13 and (3) Defendants’ use of WORM FACTORY or FACTORY OF WORMS is likely to cause  
 14 confusion as to source, affiliation, approval or sponsorship in the marketplace. *See* Conversive,  
 15 Inc., 433 F. Supp. 2d at 1087.

16 Cascade need not establish either actual confusion or intent to confuse to establish a  
 17 finding of likelihood of confusion. J.B. Williams Co. v. Le Conte Cosmetics, 523 F.2d 187, 191  
 18 (9th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). Rather, the Ninth Circuit uses the well  
 19 established Sleekcraft factors to guide analysis of trademark infringement. In the context of  
 20 products sold or marketed over the internet, the three most important Sleekcraft factors are “(1)  
 21 similarity of the marks, (2) the relatedness of the goods or services, and (3) the simultaneous use  
 22 of the Web as a marketing channel.” Brookfield, 174 F.3d at 1055 n. 16; *see also* GoTo.Com,  
 23 Inc. v. The Walt Disney Co., et al., 202 F.3d 1199, 1205 (9th Cir. 2000) (“This trinity constitutes  
 24 the most crucial body of the Sleekcraft analysis...”). These most important Sleekcraft factors are  
 25 established in this case as a matter of law, to be discussed more fully below, and obviate analysis  
 26 of the other factors, which also favor Plaintiff.

Courts presume consumer confusion where the defendant uses a mark registered with a registered mark with identical goods. Kelley Blue Book v. Car-Smarts, Inc., 802 F. Supp. 278, 287 (C.D. Cal. 1992) (“reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived”); *see also* Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc., 944 F.2d 1446, 1456 (9th Cir. 1991) (courts may infer likelihood of confusion); Dunkin’ Donuts v. Queens Bakery, Inc., 216 F. Supp. 2d 31, 44 (E.D.N.Y. 2001) (“likelihood of confusion is inevitable”). Similarly, courts presume confusion, and therefore infringement, where a licensee continues to use a mark following termination of expiration of a license. AT&T Corp. v. Vision One Sec. Sys., 1995 U.S. Dist. LEXIS 11279 (S.D. Cal. July 27, 1995) (“sale of trademarked goods after termination of a license amounts to trademark infringement”) (citing Bill Blass, Ltd. v. Saz Corp., 751 F.2d 152, 154 (3rd Cir. 1984)); Precision Door Serv. v. Bell, 2002 U.S. Dist. LEXIS 7429, 25-26 (N.D. Cal. Apr. 18, 2002) (“Continued use of a franchisor’s or licensor’s trademark after termination of the business relationship is likely to cause confusion among consumers.” (citing Burger King Corp. v. Mason, 710 F.2d 1480, 1492 (11th Cir. 1983) (use of franchisor’s trademark after termination of the license cognizable under the Lanham Act).)

2. There is no dispute as to validity or priority.

Registration of a mark on the United States Patent and Trademark Office’s Principal Register “constitutes prima facie evidence of the validity of a registered mark and of the trademark owner’s exclusive right to use the mark on the goods and services specified in the registration.” Brookfield, 174 F.3d at 1047. In addition, “federal registration of a trademark endows it with a strong presumption of validity.” KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 604 (9th Cir. 2005).

Here, Cascade’s WORM FACTORY mark is registered on the Principal Register (Reg. No. 3448973). Additionally, Defendants’ attempted to register “GUSANITO FACTORY OF WORMS,” and the USPTO rejected Defendants’ attempt based on a likelihood of confusion with

1 Cascade's WORM FACTORY mark. Specifically, the USPTO found that the "commercial  
2 impression of [GUSANITO FACTORY OF WORMS] [was] the same as [WORM  
3 FACTORY]," and Defendants' goods and Cascade's goods "[were] clearly of a similar nature."

4 Cascade's registration is thus prima facie evidence of the validity of the Mark and  
5 Cascade's ownership therein. The USPTO's rejection of Defendants' attempt to register  
6 FACTORY OF WORMS is a further testament to the strength of the WORM FACTORY mark.  
7 Cascade satisfies the first prong of the test because "it owns a valid mark and thus a protectable  
8 interest."

9 3. Registration of the Mark also raises a presumption of senior use by Cascade.

10 A plaintiff that has a federally registered trademark is "is entitled to a presumptive first  
11 used date equivalent to the filing date of its trademark registration application." Brookfield, 174  
12 F.3d at 1051 n.13. In this case, the registration reflects a first use in commerce date of March  
13 2004, and Defendants have put forth no evidence – much less carried their burden – that they  
14 used the mark in commerce prior to this date. Thus, there is no dispute as to priority here.

15 4. A key jury question is whether Defendants had permission to use the Mark.

16 Defendants do not dispute that (1) Defendants utilized the Mark (an identical version of  
17 it); (2) along with identical goods. Defendants admitted this both in deposition and in filings  
18 with the Court. The key question is whether Defendants' use was somehow authorized.

19 Cascade and Defendants were party to a written agreement. Neither party disputes the  
20 Agreement which by its terms expired on January 2008. Moreover, Defendant Russell testified  
21 in a sworn affidavit that the Agreement was terminated as of 2006. Thus, the Agreement cannot  
22 authorize continued use of the Mark by Defendants and there is no dispute about this. Because  
23 Defendants utilized the Mark following expiration or termination of the Agreement, Defendants  
24 infringed on Cascade's Mark for the full extent of post-termination use. *See 3 McCarthy on*  
25 *Trademarks and Unfair Competition*, § 25.07[1] at 25-47 (3d ed.) ("once a license contract is  
26 terminated, there is no doubt that the ex-licensee has no authorization or consent to continue use

1 of the mark. After the license has ended, the ex-licensee must stop use of the mark”). United  
 2 States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 143 (3d Cir. 1981) (“once a license has  
 3 expired, use of the formerly licensed trademark constitutes infringement”); Frisch’s Restaurant,  
 4 Inc. v. Elby’s Big Boy of Steubenville, Inc., 661 F. Supp. 971 (S.D. Ohio 1987) (a licensee’s use  
 5 of licensed mark after the expiration of the license constitutes trademark infringement), *aff’d*,  
 6 849 F.2d 1012 (6th Cir. 1988).

7 Defendants have vaguely claimed some sort of contractual right other than from the  
 8 Agreement to use the Mark, but have not (1) identified this contract, (2) identified any of the  
 9 relevant terms, or (3) produced any documentation whatsoever related to this contract. While  
 10 Mr. Russell testified that there was an agreement separate from the Agreement, he has conceded  
 11 that “it [was] not a written agreement. It [was] a verbal agreement.” Mr. Russell could not  
 12 identify any specific terms of this purported agreement, testifying that “[t]he verbal  
 13 understanding, the relationship that we had, was unlimited . . .” In Mr. Russell’s words:

14 The agreement was totally open ended, totally open ended. You know, I was  
 15 really looking forward to all of us building a huge business together.

16 Mr. Russell further testified that in his understanding, either party could terminate the agreement  
 17 without any penalty. Finally, to date Mr. Russell has not produced a single document purporting  
 18 to validate the separate arrangement between Cascade and any Defendant; Mr. Russell’s  
 19 explanation for this was that an upgrade in computer systems caused email discussions between  
 20 the parties relating to a separate agreement to become unavailable.

21 Additionally, there is no dispute about the likelihood of confusion presented by  
 22 Defendants’ use of the FACTORY OF WORMS variation, to be discussed below.

## 23 **B. DEFENDANTS’ ACTIONS MEET THE LIKELIHOOD OF CONFUSION** 24 **STANDARD FOR TRADEMARK INFRINGEMENT**

25 While the Sleekcraft test guides establishment of likelihood of confusion, not all factors  
 26 are necessary to establish likelihood of confusion, nor are the factors are equally relevant. In this



1 case, Cascade easily meets the Sleekcraft standard as modified for the internet era.

2 The determination of a likelihood of confusion is guided by the Sleekcraft factors, which  
 3 are: “(1) the strength of the marks; (2) proximity of the goods; (3) similarity of the marks; (4)  
 4 evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of  
 5 care likely to be exercised by the purchaser; (7) defendant’s intent in selecting the mark; and (8)  
 6 likelihood of expansion of the product lines.” Sleekcraft, 599 F.2d at 348-49. However, the  
 7 Sleekcraft factors are not exhaustive, and are flexible. Brookfield, 174 F.3d at 1054. Some  
 8 factors are deemed more important than others, and “it is often possible to reach a conclusion  
 9 with respect to likelihood of confusion after considering only a subset of the factors.” *Id.* (citing  
 10 Dreamwerks Prod. Group v. SKG Studio, 142 F.3d 1127, 1130-32 (9th Cir. 1998)). For  
 11 example, a finding of actual confusion is not necessary in order to determine there is a likelihood  
 12 of confusion under the Lanham Act. Hard Rock Café Licensing Corp. v. Pacific Graphics, Inc.,  
 13 776 F. Supp. 1454, 1461 (W.D. Wash. 1991) (internal quotations omitted).

14 Courts have noted that in the context of the internet, the three most important Sleekcraft  
 15 factors are “(1) similarity of the marks, (2) the relatedness of the goods or services, and (3) the  
 16 simultaneous use of the Web as a marketing channel.” Brookfield, 174 F.3d at 1055 n. 16; *see*  
 17 *also* GoTo.Com, Inc. v. The Walt Disney Co., et al., 202 F.3d 1199, 1205 (9th Cir. 2000) (“This  
 18 trinity constitutes the most crucial body of the Sleekcraft analysis...”). Each factor favors  
 19 Cascade. Moreover, an analysis of the remaining factors does nothing to tip the scales in favor  
 20 of Defendants, and thus likelihood of confusion of use of the confusingly similar term  
 21 “FACTORY OF WORMS” has been established as a matter of law in this case.

22 1. the marks are identical or nearly identical in this case.

23 The similarity of the marks is a critical issue in analyzing the Sleekcraft factors – the  
 24 more similar the marks in terms of appearance, sounds and meaning, the more likely consumers  
 25 will be confused as to the origin and sponsorship of the goods or services. *See* GoTo.Com, 202  
 26 F.3d at 1205, Brookfield, 174 F.3d at 1054. Similarities are weighed more heavily than

1 differences. *See Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993).

2 Here, there is no question the variations of the mark used by Defendants is similar in  
3 appearance, sound and meaning to Cascade's valid, distinctive federally registered WORM  
4 FACTORY mark. Defendants used both an identical mark and a mark that is a merely  
5 rearrangement of this identical mark. These marks were used extensively on documents varying  
6 from order forms to extensive online advertising efforts. In fact, the most distinctive element of  
7 each mark is FACTORY, which is an identical component of each mark. For all these reasons,  
8 this factor undoubtedly weights heavily in favor of Cascade.

9 2. The goods are also identical or nearly identical in this case.

10 The relatedness of the goods and services at issue is also a key Sleekcraft factor. This is  
11 because "related goods are generally more likely than unrelated goods to confuse the public as to  
12 the producers of the goods." Brookfield, 174 F.3d at 1055; *see also GoTo.com*, 202 F.3d at  
13 1206. Moreover, "the greater the similarity between two product lines, the greater the likelihood  
14 of confusion". Sega Enterprise, Ltd.com, 948 F. Supp. at 937.

15 Here, Cascade and Defendants are direct competitors, and it is undisputed that the  
16 products sold by Cascade and Defendants are identical: worm composting bins. Indeed, in their  
17 respective trademark applications, Cascade and Defendants used nearly identical descriptions.  
18 Cascade described its product as a "[n]onmetal upward migrating composting worm bins," and  
19 Defendants described their product as a "non-metal stackable worm farm bin." While this fact is  
20 not controlling, the fact that the description of the goods that each used with the USPTO is nearly  
21 identical is probative. In fact, there are only four competing live marks on the entire federal  
22 register for goods in the same international class that utilize the terms "worm" and "bin," which  
23 indicates that the parties operate in a relatively small industry, exacerbating the similarity of their  
24 marks. Given that Cascade and Defendants sell products that are nearly identical, in a small  
25 industry, and Defendants have used identical or nearly identical confusingly similar marks, there  
26 is a high degree of a likelihood of confusion even without consideration of the other factors. *See*

1 Brookfield, 174 F.3d at 1056 (the virtual identity of the marks used with identical products or  
 2 services results in a finding of a likelihood of confusion). This factor undoubtedly heavily favors  
 3 Cascade.

4 3. The simultaneous use of the web as a marketing channel.

5 The simultaneous use of the web as a marketing channel is a factor that many courts have  
 6 “recognized as exacerbating the likelihood of confusion.” Brookfield, 174 F.3d at 1057  
 7 (citations omitted). Here, both Cascade and Defendants utilize the internet as a marketing and  
 8 advertising channel and each maintains at least one website on the internet. In addition, both  
 9 Cascade and Defendants sell composting bins through third party internet websites, such as eBay  
 10 and Amazon. Thus, similarity of marketing channels heavily favors Cascade.

11 4. The other Sleekcraft factors.

12 In addition to the likelihood of confusion evidenced conclusively by the factors discussed  
 13 above, Cascade has also put forth evidence of actual confusion (the fourth Sleekcraft factor)  
 14 from two sources. One of Cascade’s long-time customers who also sells gardening and  
 15 composting products attests to numerous instances of customers being confused as to the  
 16 relationship between the two types of “worm factory” branded bins. Similarly, customers have  
 17 posted on the internet (in forums) questions and discussion indicating actual confusion as to the  
 18 relationship between the Cascade and Defendants. Also, evidence of actual confusion constitutes  
 19 persuasive proof that future confusion is likely. International, Inc. v. Trek Bicycle Corp., 305  
 20 F.3d 894, 902 (9th Cir. 2002). Until at least the middle of 2009, Defendants have persisted in  
 21 using Google Adwords to promote its products as “Gusanito Factory of Worms” in advertising.

22 The strength of Cascade’s mark (the first Sleekcraft factor) also favors Cascade,  
 23 especially since the registered mark was sufficiently inherently distinctive to support a rejection  
 24 of Defendants attempt at registering “GUSANITO FACTORY OF WORMS”.

25 The intent of Defendants in this case (the seventh Sleekcraft factor) is established by their  
 26 previous business relationship with Cascade and thus this factor heavily favors Cascade.

Although bad intent is not required to establish confusion, where the alleged infringer knowingly adopts a mark similar to that of another competitor, there is a presumption that the public will be deceived. Sleekcraft, 599 F.2d at 354; *see also* Conversive, Inc., 433 F. Supp. 2d at 1093. Also registration of a mark provides constructive knowledge, and Defendants presented no evidence that they had obtained a competent opinion of counsel advising that they were free to use the WORM FACTORY mark without risk in light of Cascade's mark. In fact, Barry Russell has testified that he relied on the "ethers" for advice on this matter. The remaining factors (sophistication of purchasers, likelihood of expansion) are at best neutral. Application of the factors – which all heavily favor Cascade – is not a close call. The inevitable conclusion is a likelihood of confusion. However, even in a close case, doubts are to be resolved in favor of the senior user, in this case, Cascade. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1404 n. 14 (9th Cir. 1997).

### **C. UNFAIR COMPETITION STANDARDS**

The unfair competition claim in this case is a federal unfair competition claim for use of a trademark in a manner likely to cause confusion as to the origin or quality of Cascade's goods, with respect to the WORM FACTORY Mark. For this claim Russell and the Russell Entities are liable for unfair competition if (1) their worm bins are likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection, or association of defendants with Cascade, or (2) their worm bins are likely to cause confusion, to cause mistake, or to deceive as to the origin, sponsorship, or approval of defendants' goods by Cascade. Westinghouse Electric v. General Circuit Breaker, 41 USPQ2d 1741 (9th Cir. 1997). The standards for unfair competition are similar to the standards for trademark infringement, and the facts proven by Plaintiff will satisfy these standards.

### **D. WASHINGTON CONSUMER PROTECTION ACT STANDARDS**

For Cascade to recover from Russell and/or Russell Entities on its claims for unfair and deceptive trade practices, Cascade must show by a preponderance of the evidence that:

- 1 (1) Russell and/or Russell Entities engaged in an unfair or deceptive act or practice;  
2 (2) The deceptive trade practice occurred in the course of Russell's or Russell Entities'  
3 business;  
4 (3) The deceptive trade practice affected the public interest;  
5 (4) Cascade was injured in the course of its business as a result of the deceptive trade  
6 practice; and  
7 (5) The deceptive trade practice has caused actual damages or losses to Cascade.  
8 R.C.W. §19.86, et seq.

9 Cascade will demonstrate that Defendants engaged in deceptive trade practices with  
10 respect to:

11 (1) marketing defendants' competing products as "patent pending" when no pending patent  
12 existed; (2) marketing defendants' competing products as "Made in the U.S.A." when significant  
13 components of defendants' competing products did not in fact meet this standard and were made  
14 elsewhere.

15 Cascade alleges that it has been injured by defendant Russell and defendant Russell  
16 Entities' unfair and deceptive trade practices such as those enumerated above.

## 17 **E. DAMAGES**

18 One of the key issues for the jury will be the extent of damages. With respect to the  
19 trademark claims, Cascade need only show the extent of revenues derived by Defendants from  
20 infringing uses of the Mark. It is then up to the Defendants to demonstrate their costs and what  
21 should be subtracted from revenues to arrive at profits. Defendants' responses to Cascade's  
22 discovery requests have been woefully inadequate. Defendants – by their own admission – have  
23 produced a patchwork of numbers which do not even approach a complete financial picture. In  
24 this circumstance, it will be up to the jury to weigh credibility as between the parties and assess  
25 damages as it sees fit. With respect to the Washington consumer protection act claims, Cascade  
26 is entitled to treble damages.

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#### IV. CONCLUSION

As set forth above, there will be three questions for the jury in this case: (1) whether any agreement authorizes Defendants use of the “WORM FACTORY” mark or any variations of the mark; (2) whether Defendants have any valid patents or patent applications and whether Defendants’ use of “patent pending,” constitutes a violation of the Washington Consumer Protection Act, and finally (3) whether Defendants’ use of “made in the USA” along with Defendants’ products constitutes an unfair trade practice. Perhaps the main issue for the jury is the extent and amount of damages to award to Plaintiff in this case.

Respectfully submitted, and dated this 11th day of January, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing Plaintiff's Trial Brief, via the Court's cm/ecf system. I also sent a copy of the foregoing documents to Barry Russell at his last known address on file. I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct, and that I executed this certificate of service on July 11, 2009.

*/s/ Venkat Balasubramani*

Venkat Balasubramani, WSBA 28269

